IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 7, 2007 Session

VIRGINIA BREWER v. JAMES R. BREWER

Appeal from the Chancery Court for Lawrence County
No. 11649-03 Jim T. Hamilton, Chancellor

No. M2005-02844-COA-R3-CV - Filed October 15, 2007

This appeal concerns the custodial and financial determinations upon the dissolution of a ten-year marriage. The trial court designated the wife as the permanent residential parent of the couple's four minor children and awarded the husband visitation on alternating weekends, holidays, and spring breaks plus two weeks in the summer. Having concluded that the husband did not provide reliable evidence of his potential income or pursue employment, the trial court imputed the median gross income to the husband for purposes of setting child support. With marital debts substantially exceeding marital assets, the trial court divided marital assets and debts in such a manner that the husband was responsible for three times the debt that was assigned to the wife. On appeal, the husband contends the trial court erred by not designating him as the permanent residential parent or, alternatively, by not awarding him more visitation; by imputing the median income to him for purposes of child support; and in its division of the marital debts. We have determined that the trial court did not err in designating the wife as the primary residential parent, by failing to afford to the husband more visitation time, or in its division of the marital estate. With respect to child support, we have concluded the evidence preponderates against the trial court's finding that the husband failed to pursue employment. As a consequence of this finding and the fact the husband introduced evidence of his income for the relevant period, the trial court did not have the discretion to impute the median gross income of a Tennessee male parent to the husband. We, therefore, reverse the ruling of the trial court as to the husband's child support obligation, and remand the issue for the trial court to set child support based upon the proof in the record.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part, Reversed in Part, and Remanded

FRANK G. CLEMENT, JR., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S. WILLIAM B. CAIN, J., not participating.

Thomas F. Bloom, Nashville, Tennessee, for the appellant, James R. Brewer.

Paul A. Bates, Lawrenceburg, Tennessee, for the appellee, Virginia Brewer.

OPINION

I.

When the parties married in 1995, James Brewer was thirty-seven and had three children from previous relationships, and his new wife, Virginia Brewer was twenty-two with one child from a previous relationship. During their marriage, Mr. Brewer adopted Ms. Brewer's son, Joseph, and together the Brewers had three more children. The Brewers' four children were seventeen, ten, nine, and eight years old at the time of trial.

During the marriage, Ms. Brewer was the primary care-taker of the children and also worked a series of part-time jobs including a video store and a women's fitness club. Mr. Brewer was the primary wage earner of the family as a full-time member of the Army National Guard. He began his military service in 1975 as a member of the United States Marine Corps, but the vast majority of his thirty years of military service was spent as a full-time member of the Army National Guard from which he retired in July of 2005.

While the Brewers were still married, Mr. Brewer began mixing pain killers with substantial quantities of alcohol, which according to the couple's oldest child, resulted in Mr. Brewer often being drunk and yelling before falling asleep in his chair. Mr. Brewer denies this contention and alleges that it was, instead, Ms. Brewer who engaged in improper behavior such as threatening to kill herself in front of the children on more than one occasion. Mr. Brewer also contends that Ms. Brewer has been having an affair with a domestic violence investigator and using that relationship to hinder his ability to see the children. Ms. Brewer asserts that Mr. Brewer has been physically abusive to her and has repeatedly threatened to kill her; she is afraid of him.

During the course of their marriage, the Brewers spent beyond their means and incurred debts in excess of their assets. For example, they acquired a four wheeler, a sand dune go-cart, a wave runner, spent more than thirty thousand dollars on a new Chevrolet Avalanche, purchased sixty-five acres of land, and maintained three vehicles. Pursuant to the *pendente lite* order in January of 2005,[1] Mr. Brewer was required to make payments on the couple's many loans. The monthly obligations he was ordered to pay totaled just under the four thousand dollars he earned per month while working for the National Guard, but more than his retirement income. In addition to monthly debt service, Mr. Brewer was required to pay one hundred dollars a week in child support. He generally fulfilled his court-ordered monthly obligations until May of 2005, when the divorce trial was originally set. For reasons not satisfactorily explained by the record of Mr. Brewer, he failed to make his child support payments in May or June and also failed to make payments on Ms. Brewer's vehicle. After his retirement in July of 2005, Mr. Brewer authorized the Wayne County Bank to control the allocation of a direct deposit of his retirement income, which is less than the total debts due each month.

[1] An earlier *pendente lite* order had been entered in December of 2003.

On the same day she filed for divorce, Ms. Brewer sought and obtained a temporary restraining order that prohibited Mr. Brewer from contacting or interfering with Ms. Brewer or their minor children at any time and any place. The following month, December of 2003, the court issued a *pendente lite* order that afforded Mr. Brewer visitation on Christmas day but provided no other visitation. In January of 2005, the court issued a *pendente lite* order that substantially expanded Mr. Brewer's visitation time with his children to every other weekend. The parties experienced difficulties attempting to navigate visitation and each contends the fault lies with the other. Ms. Brewer contends that Mr. Brewer engaged in threatening behavior and failed to be involved in the children's lives. Mr. Brewer denies the allegations and contends that Ms. Brewer consistently inhibited his visitation while accusing him of various transgressions.

When Ms. Brewer filed for divorce in November of 2003, Mr. Brewer was still a full-time member of the National Guard making a little more than $4,000 a month. However, bulging discs in his back and a herniated disc in his neck forced his retirement in July of 2005, resulting in his income being reduced to a gross retirement pay of $2,186 per month. This amount appears to have increased to a gross payment of $2,260.00 per month by the time of the hearing on post-trial motions and for contempt that was conducted in January of 2006.[2]

Mr. Brewer's transition into civilian employment proved difficult, due in part to what he claimed to be a disability rating of between 60% to 70%. He initially pursued construction jobs but was unable to perform manual labor due the additional aggravation such work caused to his neck and back. Searching for another type of employment, Mr. Brewer took and passed a state qualification examination for correctional and patrol officers. He applied for various related jobs. Mr. Brewer also started working toward a degree in social work that was paid for by the Veterans Administration. With this degree, he is seeking to obtain a position paying nine dollars an hour with the Wayne County Halfway House as a counselor for juveniles. Ms. Brewer, who had concentrated on taking care of the parties' four minor children, has been working part-time with Lawrence County 9-1-1, a position which pays eleven dollars an hour.

A trial was conducted in this matter in November of 2005, and a variety of post-trial motions and a motion for contempt were heard in January of 2006. In its final order, the court designated Ms. Brewer as the primary residential parent based upon a comparative fitness analysis of the parents. Among the more significant findings and conclusions by the trial court are the following: (1) the children's outstanding academic achievement has resulted from Ms. Brewer's instruction, inspiration and encouragement; (2) Ms. Brewer has been the primary care giver of the minor children throughout the marriage; (3) Mr. Brewer has not encouraged a close and continuing relationship between himself and the parties' minor children; (4) Mr. Brewer failed to provide the children with the necessities of life; (5) a stronger bond exists between Ms. Brewer and the minor children as contrasted to Mr. Brewer; and (6) Joseph Brewer, a minor child over the age of twelve, prefers to live with his mother rather than his father. The trial court also expressed a concern as to "the character and behavior of

[2]There appear to be significant deductions being taken out of Mr. Brewer's gross retirement pay thereby reducing his net pay.

[Mr. Brewer] with regard to excessive use of alcohol and other stimulants." Once the trial court designated Ms. Brewer as the primary residential parent, the court awarded Mr. Brewer parenting time on alternating weekends, holidays, and spring breaks as well as two non-consecutive weeks during the summer.

With regard to the financial aspects of the dissolution of the marriage, the trial court set child support and allocated the marital assets and debts of the parties. Mr. Brewer was retired at the time of trial, and his monthly income was $2,186. The trial court, however, concluded that he failed to produce reliable evidence of potential income and that he had failed to pursue employment. Based upon these findings, the court calculated his child support obligation based upon an imputed annual income of $35,851 and upon Ms. Brewer's annual income of $10,345.[3] Ms. Brewer was awarded 25% of Mr. Brewer's gross military retirement income, the sand dune go-cart, the 2004 Chevrolet Avalanche, and all personal property in her possession with the exception of any military equipment. Ms. Brewer was assigned the debt on the Chevrolet Avalanche, two personal loans, each in the amount of two hundred dollars, and an eight thousand dollar indebtedness to her parents. Mr. Brewer was awarded the Chandleur mobile home and the approximately sixty-five acres upon which it rests, all items of personal property in his possession, the 1998 Tahoe, the 1986 Pontiac Fiero, and the Polaris 4-wheeler. Mr. Brewer was made responsible for the debts thereupon. He was also required to pay $750 of Ms. Brewer's attorney fees.

Mr. Brewer raises three issues on appeal. First, Mr. Brewer contends that the trial court erred by designating Ms. Brewer as the primary residential parent or alternatively in failing to award him substantially more parenting time. Second, Mr. Brewer argues that the trial court erred by imputing the gross median income of Tennessee male parents to him for purposes of setting his child support obligation. Third, Mr. Brewer asserts that the trial court's allocation of debt obligations is inequitable. Additionally, Mr. Brewer requests an award of attorney fees related to the prosecution of this appeal.

II.

A.

Making determinations on issues related to custody and visitation are among the most important decisions confronting courts. *In re Zaylen R.*, No. M2003-00367-COA-R3-JV, 2005 WL 2384703, at *3 (Tenn. Ct. App. Sept. 27, 2005); *Gaskill v. Gaskill*, 936 S.W.2d 626, 630 (Tenn. Ct. App. 1996). When a court is devising a parenting plan, it should strive to create a plan that promotes the development of the children's relationship with both parents and interferes as little as possible with post-divorce family decision-making. *Shofner v. Shofner*, 181 S.W.3d 703, 715 (Tenn. Ct. App. 2004); *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 484 (Tenn. Ct. App. 1997). In approaching questions of custody and visitation, the needs of the children are paramount; the desires of the parents are secondary. *Shofner*, 181 S.W.3d at 715-16; *Gaskill*, 936 S.W.2d at 630. Custody or

[3] The court also found Mr. Brewer in willful contempt for his failure to pay support as previously ordered and directed him to promptly pay $2,700.

visitation should never be used to punish parents for their human frailties and past mis-steps or conversely as a reward for parents. *Shofner*, 181 S.W.3d at 716; *Sherman v. Sherman*, No. 01A01-9304-CH-00188, 1994 WL 649148, at *5 (Tenn. Ct. App. Nov.18, 1994). Instead, decisions on questions related to custody and visitation should be directed towards promoting the children's best interests by placing them in an environment that will best serve their physical and emotional needs. *Shofner v. Shofner*, 181 S.W.3d at 716; *Gaskill v. Gaskill*, 936 S.W.2d at 630.

Courts customarily devise initial custody and visitation arrangements by engaging in a comparative fitness analysis that requires them to determine which of the available custodians is comparatively more fit than the other. *In re Parsons*, 914 S.W.2d 889, 893 (Tenn. Ct. App. 1995). This "comparative fitness" analysis does not measure the parents against the standard of perfection because the courts are pragmatic enough to understand that perfection in marriage and parenting is as evanescent as it is in life's other pursuits. *Earls v. Earls*, 42 S.W.3d 877, 885 (Tenn. Ct. App. 2000); *Rice v. Rice*, 983 S.W.2d 680, 682-83 (Tenn. Ct. App. 1998). Rather, the analysis requires the courts to determine which of the parents, in light of their present circumstances, is comparatively more fit to assume and discharge the responsibilities of being a custodial parent. *Smith v. Smith*, No. M2003-02259-COA-R3-CV, 2006 WL 163201, at *5 (Tenn. Ct. App. Jan. 23, 2006) (No Tenn. R. App. P. 11 application filed); *Richard v. Richard*, No. M1999-02797-COA-R3-CV, 2000 WL 679233, at *5 (Tenn. Ct. App. May 25, 2000).

Custody and visitation determinations often hinge on subtle factors, including the parents' demeanor and credibility during the divorce proceedings themselves. *Gaskill*, 936 S.W.2d at 631. Accordingly, appellate courts are reluctant to second-guess a trial court's decisions. *Swett v. Swett*, No. M1998-00961-COA-R3-CV, 2002 WL 1389614, at *5 (Tenn. Ct. App. 2002); *Julian v. Julian*, No. M1997-00236-COA-R3-CV, 2000 WL 343817, at *6 (Tenn. Ct. App. Apr. 4, 2000). Trial courts must be able to exercise broad discretion in these matters,[4] but they still must base their decisions on the proof and upon the appropriate application of the relevant principles of law. *D v. K*, 917 S.W.2d 682, 685 (Tenn. Ct. App. 1995). Thus, we review these decisions de novo on the record with a presumption that the trial court's findings of fact are correct unless the evidence preponderates otherwise. *Smith*, 2006 WL 163201, at *5.

Trial courts necessarily have broad discretion to fashion custody and visitation arrangements that best suit the unique circumstances of each case. *Ray v. Ray*, 83 S.W.3d 726, 733-34 (Tenn. Ct. App. 2001). It is not our role to "tweak [these decisions] . . . in the hopes of achieving a more reasonable result than the trial court." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001); *Smith,* 2006 WL 163201, at *5. A trial court's decision regarding custody or visitation should be set aside only when it "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Eldridge*, 42 S.W.3d at 88.

[4] Tenn. Code Ann. § 36-6-101(a)(2)(A)(i) (2006 Supp.) vests the courts with "the widest discretion to order a custody arrangement that is in the best interest of the child."

B.

In conducting a comparative fitness analysis, the trial court found that "the children's outstanding academic achievement has resulted from [Ms. Brewer's] instruction, inspiration and encouragement" and that she "has been the primary care giver of the minor children, throughout the marriage." Alternatively, Mr. Brewer "has not encouraged a close and continuing relationship between himself and the parties' minor children, . . . [and] has failed to provide the children with the necessities of life." The court also found that a stronger bond existed between the minor children and Ms. Brewer than between the children and Mr. Brewer. Relatedly, the court noted that the couple's oldest child, Joseph Brewer, who was fifteen when he testified, expressed a preference for living with his mother. The court also expressed concern about the character and behavior of Mr. Brewer with regard to his excessive use of alcohol and stimulants. Accordingly, the court designated Ms. Brewer as the primary residential parent, but afforded Mr. Brewer visitation on alternating weekends, holidays, and spring break, and two full non-consecutive weeks during the summer. Mr. Brewer contends that the trial court erred by failing to designate him as the primary residential parent or alternatively by failing to allow him more visitation time.

Permanent parenting plans must include a residential schedule. Tenn. Code Ann. § 36-6-404(b). A residential schedule designates the primary residential parent and "in which parent's home each minor child shall reside on given days of the year . . . ." Tenn. Code Ann. § 36-6-402(5). In formulating this residential schedule, the court must make "residential provisions for each child, consistent with the child's developmental level and the family's social and economic circumstances, which encourage each parent to maintain a loving, stable, and nurturing relationship with the child." Tenn. Code Ann. § 36-6-404(b). Provided that the limitations of Tenn. Code Ann. § 36-6-406 are not dispositive of the child's residential schedule, the court shall consider the statutory factors relevant to the case. Those relevant to the issues on appeal include:

> (1) The parent's ability to instruct, inspire, and encourage the child to prepare for a life of service, and to compete successfully in the society that the child faces as an adult;
> (2) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting responsibilities relating to the daily needs of the child;
> (3) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interests of the child;
> . . . .
> (5) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care;
> . . . .
> (7) The love, affection, and emotional ties existing between each parent and the child;
> . . . .

> (9) The character and physical and emotional fitness of each parent as it relates to each parent's ability to parent or the welfare of the child;
> . . . .
> (11) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;
> . . . .
> (14) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preference of older children should normally be given greater weight than those of younger children; . . .

Tenn. Code Ann. § 36-6-404(b).

Mr. Brewer asserts that the trial court erred in its assessment of the relevant factors. As for factor one,[5] he argues that there is "absolutely no evidence to support the trial court's conclusion that 'the children's outstanding academic performance has resulted from [Ms. Brewer's] instruction, inspiration, and encouragement.'" Mr. Brewer does not dispute that his children are performing well in school; rather, he suggests that "there is no indication that this outstanding performance is not attributable to raw native intelligence or other factors having nothing to do with" Ms. Brewer. Additionally, Mr. Brewer contends that his approximately thirty years of military service when compared with Ms. Brewer's series of "low-paying . . . unskilled jobs . . . establishes that he is better able to instruct, inspire and encourage the children to prepare for a life of service and to compete successfully in society."

The record tell us that Ms. Brewer is actively involved with her children's education, helping with their homework and remaining in regular contact with their school teachers; Mr. Brewer is not. Mr. Brewer failed to present evidence in support of his biological determinist theory that his children's academic achievement is solely linked to "raw native intelligence" and has failed to identify these "other factors" that render Ms. Brewer's involvement in their minor children's education irrelevant.

Tennessee courts have consistently found parental involvement with the educational development of minor children to be a significant factor, among many others, in custodial and visitation decisions. *See e.g.*, *Zabaski v. Zabaski*, No. M2001-02013-COA-R3-CV, 2002 WL 31769116, at *5 (Tenn. Ct. App. Dec. 11, 2002); *Killion v. Sweat*, 2000 WL 1424809, at *3 (Tenn. Ct. Sept. 21, 2000); *Graham v. Graham*, 1995 WL 447785, at *1 (Tenn. Ct. App. July 31, 1995). We are not inclined to abandon our understanding that parents can make critical contributions to the educational achievement of their children on the basis of Mr. Brewer's casual assertion that Ms. Brewer's involvement is irrelevant. Additionally, while Mr. Brewer's military service is admiral, the trial court took into consideration the fact that he has not coped well with his retirement and

[5] Tenn. Code Ann. § 36-6-404(b)(1) ("The parent's ability to instruct, inspire, and encourage the child to prepare for a life of service, and to compete successfully in the society that the child faces as an adult.").

disability. This finding is supported by the fact he spends much of his time sitting in a chair, drinking excessively, taking "a lot of" pills, and falling asleep.

Mr. Brewer contends the trial court erred in concluding that he failed to establish a close and continuing relationship with the children because, he alleges, it was Ms. Brewer who inhibited such a relationship through various means most notably by contacting the police to accuse Mr. Brewer of misconduct and by obtaining a temporary restraining order. Similarly, with regard to Ms. Brewer having a stronger relationship with the children, her remaining the primary residential parent being in the interests of continuity, and Joseph's preference for living with his mother, Mr. Brewer contends that these findings have resulted from Ms. Brewer improperly having prevented him from seeing the children for a substantial period of time.[6]

Contrary to the assertions of Mr. Brewer, the record supports the trial court's conclusion that Ms. Brewer has a closer, stronger, and more stable relationship with the children than Mr. Brewer, that love, affection, and emotional ties run deeper between the children and Ms. Brewer than Mr. Brewer, and that the interests of maintaining a stable satisfactory environment are better served by Ms. Brewer being the permanent residential parent and with the visitation schedule as ordered. Additionally, Joseph Brewer's testimony clearly demonstrates his preference for residing with Ms. Brewer.

Mr. Brewer contends that Ms. Brewer was involved in an affair with a domestic violence investigator, a member of local law enforcement, that she exploited to improperly prohibit him from visiting with his children. The evidence in support of Mr. Brewer's allegation is weak, and Ms. Brewer denies having had an affair. Ms. Brewer contends that she contacted the police not to harass Mr. Brewer but in response to his exhibiting improper behavior or when she suspected him of such behavior, such as breaking into her home. We are not persuaded that the evidence preponderates in favor of concluding that Ms. Brewer improperly inhibited a relationship between Mr. Brewer and the children by means of drawing upon an alleged personal relationship with a local law enforcement officer.

As for the disposition of each parent to provide food, clothing, medical care, education and other necessary care, Mr. Brewer argues that "after his forced retirement in July 2005 [he] paid every penny of his income toward the obligations set forth in the *pendente lite* order." Any benefit this positive fact may have afforded Mr. Brewer is negated by the fact he willfully failed to meet his financial support obligations in May and June of 2005, which was prior to his retirement. Mr.

[6] We find Ms. Brewer's response to this contention somewhat disingenuous. She contends he should have more regularly visited with and contacted his children regularly throughout the twenty-two month separation period. We find her contention disingenuous because she obtained a temporary restraining order in November of 2003, which prohibited the activity in which she now suggests Mr. Brewer should have engaged. Mr. Brewer was allowed visitation only on Christmas; however, a temporary parenting plan was put into effect in January of 2005 that allowed Mr. Brewer to have visitation time every other weekend. Her argument as to his lack of involvement, i.e., failing to attend games, call the children, etc., is more persuasive as it pertains to the time period between this January 2005 order and the trial in November of 2005, when he was afforded significantly more latitude to interact with the children.

Brewer claimed at trial that he believed that his support obligations terminated at the beginning of May 2005 when the trial of this matter was originally scheduled and had no idea that his obligation continued with the trial having been moved back to November of 2005. The trial court found Mr. Brewer's "testimony to not be credible with regard to the reason that he did not pay child support after May 1, 2005." This credibility finding is significant because we give great weight to a trial court's determinations of credibility of witnesses. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000).

As for the character and fitness of each parent as it relates to his or her ability to the welfare of the children, Mr. Brewer contends that Ms. Brewer has been irrational and violent, and that the trial court erred by failing to view such conduct as more culpable than Mr. Brewer's mixing of excessive amounts of alcohol with his prescription pills. Ms. Brewer denies having engaged in the various outbursts as to which she was questioned on cross-examination. With his assertion and her denial, proving the alleged conduct is therefore dependent on the trial court's determination of the credibility of the only two witnesses to the alleged incidents, Mr. Brewer and Mrs. Brewer. The credibility issue was resolved by the trial court in favor of Ms. Brewer. Moreover, the record supports the trial court's findings that Ms. Brewer's behavior is more conducive with appropriate parenting, and consistent with maintaining the welfare of the parties' children than Mr. Brewer's past behavior.

Having considered the arguments raised by Mr. Brewer on appeal and the record before us, we find no error with the trial court decision designating Ms. Brewer as the permanent residential parent or by failing to afford Mr. Brewer more visitation time.

III.
CHILD SUPPORT

The court found that Mr. Brewer "failed to produce reliable evidence of potential income and that [Mr. Brewer] has failed to pursue employment." Based upon these findings, the trial court set Mr. Brewer's child support obligation based upon the imputed median annual income of Tennessee male parents ($35,851.00).[7] *See* Tenn. Comp. R. & Regs. 1240-2-4-.04 (2005). Mr. Brewer contends the facts preponderate against the trial court's findings upon which the decision to impute income was based. We agree with Mr. Brewer.

Under Tennessee law, imputing income for the purposes of child support payments is appropriate (1) if a parent has been determined by a tribunal to be willfully and/or voluntarily underemployed or unemployed, (2) when there is no reliable evidence of income, or (3) when the parent owns substantial non-income producing assets. Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(i) (2007). Failure to produce reliable evidence of income, Tenn. Comp. R. & Regs.

[7] The standard imputation amount has been raised to thirty-six thousand three hundred sixty-nine dollars ($36,369) for male parents and twenty-six thousand nine hundred eighty-nine dollars ($26,989) for female parents. Tenn. Comp. R. & Regs. 1240-2-4-.04 (2007).

1240-2-4-.04(3)(a)(2)(2005), and willful and voluntary underemployment or unemployment, Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(d)(2005), provided grounds for imputing income under the version of Tenn. Comp. R. & Regs. 1240-2-4-.04 that existed when the trial court imputed income to Mr. Brewer in November of 2005.

We first address the trial court's conclusion that Mr. Brewer is willfully or voluntarily unemployed. Under Tennessee law, there is no presumption that a parent is willfully or voluntarily underemployed or unemployed; to the contrary, the party alleging that a parent is willfully or voluntarily underemployed or unemployed carries the burden of proof. Tenn. Comp. R. & Regs.1240-2-4-.04(3)(a)(2)(ii) (2007)("The Guidelines do not presume that any parent is willfully and/or voluntarily under or unemployed."); *Richardson v. Spanos*, 189 S.W.3d 720, 727 (Tenn. Ct. App. 2005). Consequently, Ms. Brewer carries the burden of demonstrating that Mr. Brewer is willfully or voluntarily underemployed or unemployed.

The trial court excluded much of the evidence Mr. Brewer attempted to provide of his "physical condition" and "medical diagnoses." Mr. Brewer contends that the trial court erred by excluding the evidence related to his "physical condition." As for the trial court's exclusion of testimony related to Mr. Brewer's "medical condition," we find the trial court correctly excluded testimony that constituted the hearsay diagnosis and opinion of Mr. Brewer's physician.[8] As for the trial court's exclusion of Mr. Brewer's testimony concerning his "physical condition," we find the trial court erred by excluding testimony by Mr. Brewer of his "physical condition" and "physical limitations."

A lay witness may testify to his "physical condition" if he sets forth facts to support the alleged symptoms and limitations. *See Thomas v. Thomas*, No. 01-A-01-9409-CV00415, 1995 WL 146477, at *3 (Tenn. Ct. App. Apr. 5, 1995);[9] *see also Mitchell v. Green*, No. W2005-01057-COA-R3-JV, 2006 WL 1472364, at *6 (Tenn. Ct. App. May 30, 2006)(internal citations omitted); *Leek v. Powell*, 884 S.W.2d 118, 120 (Tenn. Ct. App. 1994); *Wood v. Edenfield Elec. Co.*, 364 S.W.2d 908, 911 (Tenn. 1963); *Hamlin and Allman Ironworks v. Jones*, 292 S.W.2d 27 (Tenn.

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[8]The following is an example of Mr. Brewer testifying as to his "medical" condition:

Question (from Mr. Brewer's counsel): Do you have a medical condition?
Answer (by Mr. Brewer): Yes.
Question: What is that medical condition?
Answer: I have bulging discs. I have a herniated disc in my neck.
(Counsel for Ms. Brewer): Objection, Your Honor, it calls for expert testimony.
THE COURT: Well, I guess that's true . . . .

[9]The defendant in *Tyner* argued that there was no medical proof that the plaintiff's health was not good; only the plaintiff's testimony that her health was declining. The court held that expert testimony was not required for such proof because a lay witness may testify to her own "physical condition" if she sets forth sufficient facts. *Tyner v. Tyner*, 1985 WL 4136, at *2 (Tenn. Ct. App. Dec. 5, 1985). The court went on to note "the weight and credibility of such testimony is a matter for the trier of fact." *Id*. In her testimony, Sharon Tyner outlined her medical condition with sufficient detail for the court to consider her testimony as material evidence of her health problems. *Id*.

1956). The weight and credibility to be given to a witness' testimony lies, of course, with the trier of fact, and the credibility accorded by the trial court will be given great weight by the appellate courts. *Thomas v. Thomas*, 1995 WL 146477, *3 (Tenn. Ct. App. April 5, 1995) (citing *Leek v. Powell*, 884 S.W.2d 118, 120 (Tenn. Ct. App. 1994)). However, testimony by Mr. Brewer that he had "a bulging lumbar disc," "a herniated cervical disc" go far beyond a lay person testifying as to his "physical condition." Although Mr. Brewer knows whether his back or neck hurts, and that he cannot lift heavy objects repeatedly, or sit for long periods without pain, he has no way of knowing that his pain or limitations are caused by a bulging lumbar disc or a herniated cervical disc, as distinguished from a muscle strain, or a pinched nerve. Furthermore, Mr. Brewer, as a lay person, is in no position to testify that he has an impairment rating of "60%." Expert medical proof of such conditions and impairments is generally required, as the trial court correctly found.[10] *See Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991) (holding that proof of "a medical condition and permanency of an injury must be established by testimony from medical experts"). The diagnoses and impairment ratings Mr. Brewer attempted to introduce through his testimony are not within the personal knowledge of a lay person. Thus, only a duly qualified expert witness would have the expertise to offer such testimony.

Accordingly, the trial court correctly excluded and we may not consider the testimony by Mr. Brewer that he had a bulging disc in his back and a herniated disc in his neck, or that he was forced to retire from the National Guard in July of 2005 because he was 60% disabled. We may, however, consider the fact that he had served in the military since the mid-1970s, that he struggled to transition into civilian employment following his retirement, that he believed his qualifications best suited him to perform manual labor jobs, and that repetitive manual labor aggravated his neck and back pain. Mr. Brewer testified that he sought employment with a number of other employers including with Delta Steel, as a sales representative, and Mail Room Services, but was unsuccessful in obtaining a position with either firm. Mr. Brewer also testified that he passed a state qualification examination for positions as a correctional or patrol officer and that he applied for positions with the Sheriff Departments of Wayne, Giles, and Maury County. He also testified that he hoped to obtain a social work degree and believed such a degree would lead to his employment as a counselor for juveniles at the Wayne County Halfway House. In fact, Mr. Brewer testified at a January 2006 hearing that he believed he was close to obtaining the position with the Wayne County Halfway House.

Ms. Brewer had the evidentiary burden to prove that Mr. Brewer was willfully or voluntarily unemployed; however, she failed to present sufficient evidence to counter that presented by Mr. Brewer. The uncontroverted evidence in the record reveals that Mr. Brewer was unable to perform manual labor and that he struggled in his efforts to find employment, due in part to the fact repetitive manual labor caused pain in his back and neck. Based on the record before us, we find the evidence preponderates against the trial court's finding that Mr. Brewer "failed to pursue employment." We

[10] An expert's opinion testimony is generally admissible if (1) the witness is qualified as an expert by "knowledge, skill, experience, training, or education", and (2) the testimony will "substantially assist the trier of fact to understand the evidence or to determine a fact in issue." *See* Tenn. R. Evid. 702; *see also Bolton v. CNA Ins. Co.*, 821 S.W.2d 932, 935 (Tenn. 1991).

therefore conclude that Mr. Brewer was not willfully and/or voluntarily underemployed or unemployed.

The courts may also impute income for purposes of child support when "there is no reliable evidence of a parent's income."[11] Tenn. Comp. R. & Regs. 1240-2-4- .04(3)(a)(2)(i). Examples of reliable evidence include tax returns for prior years and paycheck stubs. Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(i)(2005). The Rule also expressly anticipates that other information may be used as reliable evidence insofar as it allows the court to determine a parent's current ability to support or where retroactive support is at issue, a parent's ability to support in prior years. Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(iv)(I)(I.)(2007). The courts, however, may not impute income for purposes of child support when reliable evidence of a parent's income has been presented. *State ex rel. Rion v. Rion*, No. 01A01-9704-CV-00194, 1997 WL 796212, at *2 (Tenn. Ct. App. Dec. 31, 1997) (holding "The plain language of these sections indicates that the median income amount is to be used as a fall back only when the court has no other reliable evidence of the obligor's income or income potential").[12]

We have concluded that the evidence preponderates against the trial court's finding that Mr. Brewer was willfully or voluntarily unemployed. We have also determined, based on the fact Mr. Brewer testified as to his retirement income and admitted into evidence his retiree account statement from the Defense Finance and Accounting Service for U.S. military retirement pay, that there is reliable evidence of his actual income. As a consequence of these two findings, we have concluded that the trial court erred by imputing the median income to Mr. Brewer.

III.

WHETHER THE TRIAL COURT ERRED IN ITS DIVISION OF THE MARITAL DEBT

A.

Dividing a marital estate necessarily begins with the classification of the parties' property as either separate or marital property. *Flannary v. Flannary*, 121 S.W.3d 647, 650 (Tenn. 2003); *Conley v. Conley*, 181 S.W.3d 692, 700 (Tenn. Ct. App. 2005); *Anderton v. Anderton*, 988 S.W.2d 675, 679 (Tenn. Ct. App. 1998). Questions regarding the classification of property as either marital or separate, as opposed to questions involving the appropriateness of the division of the marital estate,

[11] Imputing income for the purposes of child support is appropriate under anyone of three circumstances, one of which is when there is no reliable evidence of income. Tenn. Comp. R. & Regs. 1240-2-4- .04(3)(a)(2)(i) (2007).

[12] Potential income is not an issue unless there has been a showing of some deficiency in utilizing the parent's actual income, which may include a parent manipulating his income or willfully being underemployed or unemployed. *Eatherly v. Eatherly*, No. M2000-00886-COA-R3-CV, 2001 WL 468665, at *4 (Tenn. Ct. App. May 4, 2001) ("The two approaches, establishing potential income in a willful underemployment situation and imputing income where actual ability to receive income from business activities is underreported, while dependent on different factual underpinnings, are both methods to arrive at the most accurate determination of the obligor parent's income and ability to support.").

are inherently factual and we review a trial court's decisions classifying property using the standard of review in Tenn. R. App. P. 13(d).

Once a trial court has classified the property as either marital or separate, it should place a reasonable value on each piece of property subject to division, and the parties have the burden of proof to come forward with competent valuation evidence. *Kinard v. Kinard*, 986 S.W.2d at 231; *Wallace v. Wallace*, 733 S.W.2d 102, 107 (Tenn. Ct. App. 1987). When valuation evidence is conflicting, the court may place a value on the property that is within the range of the values represented by all the relevant valuation evidence. *Watters v. Watters*, 959 S.W.2d 585, 589 (Tenn. Ct. App. 1997); *Brock v. Brock*, 941 S.W.2d 896, 902 (Tenn. Ct. App. 1996). Decisions regarding the value of marital property are questions of fact, *Kinard v. Kinard*, 986 S .W.2d at 231, and such decisions will not be second-guessed unless they are not supported by a preponderance of the evidence. *Smith v. Smith*, 93 S.W.3d at 875; *Ray v. Ray*, 916 S.W.2d 469, 470 (Tenn. Ct. App. 1995).

Once the marital property has been valued, the trial court's goal is to divide the marital property in an essentially equitable manner. Tenn. Code Ann. § 36-4-121(a)(1); *Miller v. Miller*, 81 S.W.3d 771, 775 (Tenn. Ct. App. 2001). A division of marital property is not rendered inequitable simply because it is not precisely equal, *Robertson v. Robertson*, 76 S.W.3d 337, 341 (Tenn. 2002), *Cohen v. Cohen*, 937 S.W.2d at 832, or because each party did not receive a share of every piece of marital property, *Morton v. Morton*, 182 S.W.3d 821, 833-34 (Tenn. Ct. App. 2005); *Manis v. Manis*, 49 S.W.3d 295, 306 (Tenn. Ct. App. 2001).

Dividing marital property is not a mechanical process but rather is guided by carefully weighing the relevant factors in Tenn. Code Ann. § 36-4-121(c). *Flannary v. Flannary*, 121 S.W.3d at 650-51; *Tate v. Tate*, 138 S.W.3d 872, 875 (Tenn. Ct. App. 2003); *Kinard v. Kinard*, 986 S.W.2d at 230. Trial courts have broad discretion in fashioning an equitable division of marital property, *Jolly v. Jolly*, 130 S.W.3d 783, 785 (Tenn. 2004); *Fisher v. Fisher*, 648 S.W.2d 244, 246 (Tenn. 1983), and appellate courts must accord great weight to a trial court's division of marital property, *Wilson v. Moore*, 929 S.W.2d 367, 372 (Tenn. Ct. App. 1996); *Batson v. Batson*, 769 S.W.2d at 859. Accordingly, it is not our role to tweak the manner in which a trial court has divided the marital property. *Morton v. Morton*, 182 S.W.3d at 834. Rather, our role is to determine whether the trial court applied the correct legal standards, whether the manner in which the trial court weighed the factors in Tenn. Code Ann. § 36-4-121(c) is consistent with logic and reason, and whether the trial court's division of the marital property is equitable. *Jolly v. Jolly*, 130 S.W.3d at 785-86; *Kinard v. Kinard*, 986 S.W.2d at 231.

The manner in which the trial court divides the marital property cannot be considered without also considering the manner in which the trial court allocates the marital debt. Trial courts have not completely divided a marital estate until they have allocated both the marital property and the marital debt. *Robertson v. Robertson*, 76 S.W.3d at 341; *Anderton v. Anderton*, 988 S.W.2d at 679.

B.

Dividing the Brewers' estate is largely a question of the division of debt with marital debt substantially exceeding the value of marital assets. Mr. Brewer argues that the net outcome of the trial court's division of the estate is that he is responsible for is $36,225 of debt while Ms. Brewer is only responsible for $11,400. Ms. Brewer differs with his numbers, contending the division is more accurately $33,384 of debt to Mr. Brewer and $11,465 of debt to Ms. Brewer. Nevertheless, Mr. Brewer insists that Ms. Brewer, rather than he, is in a better position to pay down this debt and that the trial court erred in allocating a burden that is approximately three times larger upon him than Ms. Brewer. We find no error with the trial court's division of the marital estate.

Mr. Brewer was awarded the marital home and surrounding property, a 1998 Chandleur mobile home located on 64.9 acres in Westpoint, Tennessee, all of the separate personal property in his possession, and any military equipment that is in Ms. Brewer's possession. As requested, Mr. Brewer was also awarded the 1998 Tahoe, 1986 Pontiac Fiero, and the Polaris 4-wheeler. Ms. Brewer was awarded the 2004 Chevrolet Avalanche, all personal property in her possession with the exception of military equipment left by Mr. Brewer, and the sand dune go-cart, which Mr. Brewer indicated that he did not want. The court ordered that the debts on these various items are to follow the assets. The trial court also ordered that Ms. Brewer would be responsible for a $200 loan from Darrell Yarbrough, a $200 loan from Lisa Kiddy, and an $8,000 loan from Mr. and Mrs. Clifton (Ms. Brewer's parents).

Ms. Brewer has the primary parenting responsibility for raising four children with relatively little income. She is more than a decade removed from completion of a certificate program in computer aided design, a field in which she never worked. Her financial needs are significant and her economic circumstances unfavorable. With the trial court's division of property entitled to great weight and having thoroughly reviewed the record of this case, we affirm the division of the marital estate.

IV.
WHETHER MR. BREWER IS ENTITLED TO AN AWARD OF ATTORNEYS FEES ON APPEAL

Mr. Brewer contends this court should award him attorney's fees because he is disadvantaged in comparison to Ms. Brewer, has no funds to pay his attorney, and the issues that he has raised on appeal are meritorious. In domestic relations cases, the courts have the authority to make an additional award to economically disadvantaged spouses to enable them to defray all or part of their legal expenses. *Elliott v. Elliott*, 149 S.W.3d 77, 88 (Tenn. Ct. App. 2004); *Koja v. Koja*, 42 S.W.3d 94, 98 (Tenn. Ct. App. 2000); *Butler v. Butler*, 680 S.W.2d 467, 471 (Tenn. Ct. App. 1984). If an appellate court determines that an additional award for attorney's fees is appropriate, the proper procedure is to remand to enable the trial court to determine the amount of attorney's fees that should be awarded. *Folk v. Folk*, 210 Tenn. 367, 378-79, 357 S.W.2d 828, 828-29 (1962). This record fails to establish that Mr. Brewer is disadvantaged in comparison with Ms. Brewer. Moreover, he did not

prevail on appeal with regard to three significant issues: (1) whether the trial court erred in designating Ms. Brewer as the primary residential parent, (2) whether the trial court erred by failing to afford him more visitation time, and (3) whether the trial court erred as to its division of the marital debts. Finding no meritorious basis upon which to award attorney fees to Mr. Brewer, the request is respectfully denied.

V.

We affirm the trial court's decision to designate Ms. Brewer as the primary residential parent and the visitation schedule set by the trial court in its November 18, 2005, order and the court's allocation of marital assets and debts contained in that same order. We reverse the trial court's imputation of the median income of male parents in Tennessee to Mr. Brewer. We are uncertain as to Mr. Brewer's current employment status and income, thus, we remand this case to the trial court for a determination of Mr. Brewer's income for purposes of setting child support.[13] This matter is remanded for further proceedings consistent with this opinion, and costs of this appeal are taxed in equal proportions to Mr. Brewer and his surety, and to Ms. Brewer, for which execution, if necessary, may issue.

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FRANK G. CLEMENT JR., JUDGE

[13] On remand, Ms. Brewer remains free to prove that Mr. Brewer is willfully or voluntarily underemployed or unemployed based upon new developments that have occurred while this case has been pending on appeal. Mr. Brewer is also free to present evidence as to Ms. Brewer's income.